

LAW OFFICE OF ROGER H. CONTRERAS  
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(520) 762-4111 Telephone

FILED

2019 NOV 14 PM 2:45

ROGER H. CONTRERAS, Esq.  
(ASB No. 015406)  
RContreras@AttorneyRC.com  
Attorney for Defendant

CLERK OF SUPERIOR COURT  
BY Ba

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA

Plaintiff,

vs.

EDWARD L. THOMAS

Defendant.

Case No. CR201900690

HON. TIMOTHY B. DICKERSON  
Division IV

**MOTION TO DISMISS FOR PRE-  
INDICTMENT DELAY**

Defendant, EDWARD L. THOMAS, by and through Roger H. Contreras, his counsel of record, hereby moves the Court, pursuant to Article 2 §§ 4 and 24 of the Arizona Constitution, the 5th and 14th Amendments to the U.S. Constitution, *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2s 468 (1971), *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), and *State v. Broughton*, 156 Ariz. 394, 752 P.2d 483 (1988), to dismiss the Indictment in the above-captioned matter for pre-indictment delay. During the time since the offenses charged allegedly occurred in February or March 2007 (the Cochise County Sheriff's Office began their investigation on or about June 21, 2007), the State has lost or intentionally destroyed critical evidence the absence of which has prejudiced Defendant's ability to defend against charges contained in the Indictment returned on August 29 2019, more than twelve (12)

1 years later. This Motion is based upon this notice, the entire file in the above-captioned matter,  
2 and any documentary and testamentary evidence presented at the hearing, if any.

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. Facts.**

6 Defendant, Edward L. Thomas, is scheduled for trial commencing on January 28, 2020  
7 on charges contained in the Indictment returned herein on August 29, 2019. Defendant is  
8 charged with three (3) Class 2 Felony offenses, all of which allegedly occurred “[o]n or about  
9 February 2007 or March 2007”. Investigation of the alleged offenses commenced on or about  
10 June 21, 2007, when the Cochise County Sheriff’s Office opened DR07-10958. The  
11 investigation was completed and forwarded to the Cochise County Attorney’s Office for review  
12 for prosecution on or about August 9, 2007. (*See* DR07-10958, at page 14 of 19.)

13 On February 2, 2009, Cochise County Sheriff’s detectives interviewed Defendant. (*Id.*,  
14 at 15 of 19.) As of August 2009, the matter was *still* pending review at the Cochise County  
15 Attorney’s Office. (*Id.*, at 17 and 18 of 19.) “No information existed as to what occurred with  
16 the investigation between 2009 and” November 18, 2018. (*Id.*, at 19 of 19.)

17 In the interim between the delivery of the investigation by the Cochise County Sheriff’s  
18 Office to the Cochise County Attorney’s Office on or about August 9, 2007 and the interview of  
19 Defendant on February 2, 2009, the Cochise County Attorney’s Office, by and through former  
20 Deputy County Attorney Marc Offenhartz, delivered a Notice of Disposal of Evidence letter  
21 dated April 14, 2008, in which the State authorized the disposal of evidence in DR07-10958.  
22 (*See*, “NOD” letter dated April 14, 2008, State’s disclosure page 53.)

23 After receiving the State’s Rule 15 Disclosure Statement and included exhibits on  
24 August 28, 2019, Defendant’s counsel requested additional disclosure via email dated August  
25 29, 2019 at 11:20, including the following items:

26 ///

27 ///

Re: 07-10958

9326-A1

Job #6 (referenced on p62) digital audio of [ ] interview Michelle Hunter/Amy Evans (from TV)

9326-DVD1

(referenced on p62) digital visual recording of same interview

9326-A2

Job #17 (referenced on p61) interview with Staphanie [sic] Hunter

**9326-A3**

**Job #19 (referenced on p60) digital audio recording of interview with Ed Thomas**

Re: 03-00483:

0213-1

(referenced on p25) Panasonic Microcassett [sic] Red=Black-White in Color

0213-2

(referenced on p25) TDK microcassett [sic] Black-white in color

Remainder of report commencing p48

Remainder of report commencing p45

Remainder of report commencing p36

Since then, Defendant's counsel has received ONLY the item bolded above (9326-A3 Job #19 (referenced on p60) digital audio recording of interview with Ed Thomas).

On October 10, 2019, at 12:24, Defendant's counsel requested the remaining, outstanding items from the State. Counsel for the State responded, on October 10, 2019, at 12:30, indicating that Defendant's counsel "should have received everything so far that is in the State's possession. Due to the age of the original investigation, certain items are no longer available. Those items that remain in the State's possession have been disclosed." A few minutes later, on October 10, 2019 at 12:36, the State's attorney indicated *ONLY* that "[t]he audio recording of Thomas' 'confession' is available." No further mention was made of any other item of disclosure previously requested. Defendant's counsel delivered a request for clarification, on October 10, 2019 at 12:48, asking for confirmation of his understanding that 9326-A3 was ALL that remains available in the entire list of discovery requests delivered 'due to the age of the original investigation.' The State's attorney responded, on October 11, 2019 at 9:52, indicating that "[s]ome stuff no longer exists, such as a copy of the forensic interview. I will look for the exact things you're requesting though." Defendant's counsel replied (on October 11, 2019 at 12:27) regarding the confusion created by conflicting statements of the State's attorney that either "[t]hose items that remain in the State's possession have been disclosed"; that everything else is no longer available due to the age of the case, or that "*some*

1 *stuff* no longer exists” (emphasis added), and the State’s attorney promised to “look for the  
2 exact things” Defendant requested.

3 On October 15, 2019 at 16:55, the State’s attorney emailed Defendant’s counsel to  
4 indicate that “Job# 6 (Audio/video from [] interview) [is] No longer available.” “The State’s  
5 attorney further indicated that he was “still checking” on Job# 17 (Interview with Stephanie  
6 Hunter) (9326-A2). There was no mention of 9326-DVD1. Regarding the items contained in  
7 DR03-00483, the State’s attorney indicated that he was “working on that one. I’ve had the old  
8 file pulled from archives to see what may still be around. Most of what [Defendant is] looking  
9 for is in that 2003 report.”

10 On November 7, 2019 at 10:58, Defendant’s counsel inquired whether the State’s  
11 attorney had made “[a]ny further progress on these discovery requests?” While he did receive  
12 the State’s attorney’s auto-reply that he would be out of the office until November 12, 2019, no  
13 further response has been received. (The entirety of these email communications regarding  
14 disclosure is contained in Defendant’s Exhibit A, attached hereto and incorporated herein by  
15 this reference.)

16 Defendant’s Pre-Trial Conference is scheduled for December 9, 2019, less than a month  
17 away, and his Jury Trial of January 28, 2020 is rapidly approaching, especially considering the  
18 intervening holidays.

19 Defendant submits that the State’s delay of MORE THAN TWELVE (12) YEARS in  
20 obtaining an Indictment in this matter against him resulted in critical pieces of evidence  
21 favorable to the defense being lost or destroyed by the Cochise County Sheriff’s Office, at the  
22 direction of the Cochise County Attorney’s Office or otherwise, allowing the State to gain a  
23 tactical advantage over Defendant at his trial. Under these circumstances, a fair trial will never  
24 be possible and the Indictment in its entirety should be dismissed with prejudice.

25 ///

26 ///



## II. Law and Argument.

Article 2, § 4 of the Arizona Constitution provides “No person shall be deprived of life, liberty, or property without due process of law.” Article 2, § 24 provides, in part, “In criminal prosecutions, the accused shall have the right...to have a speedy public trial...”

The 5th Amendment to the United States Constitution states, in part, “No person shall...be deprived of life, liberty, or property, without due process of law...” The 14th Amendment states, in part, “nor shall any state deprive any person of life, liberty, or property, without due process of law...”

The Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution prevent the State from bringing criminal charges against a person after an unreasonable delay. *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996); *accord United States v. Lovasco*, 431 U.S. 783, 789-790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 324-25, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). “To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, and that the defendant has actually been prejudiced by the delay.” *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988); *accord Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). A defendant bears a “heavy burden to prove that pre-indictment delay cause actual prejudice.” *Broughton*, 156 Ariz. at 397-98, 752 P.2s at 486-87.

In this matter, the State delayed bringing the Indictment for OVER TWELVE (12) YEARS. During that delay, the Cochise County Sheriff’s Office destroyed relevant evidence, either at the direction of the Cochise County Attorney’s Office or otherwise, including interviews of the purported victims. Notice of the destruction of evidence was never provided to Defendant. (See, State’s disclosure page 53.) Whether the destruction of evidence was intentional or merely neglect on the part of the State is irrelevant. The State intentionally delayed the proceedings to gain a tactical advantage over Defendant, and Defendant has


1 actually been prejudiced by the delay. There has been no showing that the prosecutorial delay  
2 was for any legitimate purpose (such as to continue the investigation in order to obtain  
3 sufficient probable cause against another defendant to support an indictment. There IS  
4 prejudice due to the destruction of evidence in the interim. That destroyed evidence may have  
5 been exculpatory. There is no way to know now what the "victims" said during their 2007  
6 interviews, or even if they said anything inculpatory of Defendant whatsoever.

7 **III. Conclusion.**

8 WHEREFORE, based on the reasons and authorities cited above, this Court must find  
9 that the State's delay in obtaining an Indictment against Defendant for OVER TWELVE (12)  
10 YEARS without any legitimate explanation or justification resulted in the destruction of key  
11 pieces of evidence in this matter by the Cochise County Sheriff's Office, and those pieces of  
12 evidence may have been exculpatory of Defendant. Therefore, the Indictment in this matter  
13 must be dismissed in its entirety, with prejudice.

14 Dated this 14th day of November, 2019.

15 LAW OFFICE OF ROGER H. CONTRERAS

16  
17 By:   
18 ROGER H. CONTRERAS, Esq.  
Attorney for Defendant

19 Copy of the foregoing  
20 mailed/delivered/faxed  
21 this 14th day of November,  
2019, to:

22 The Honorable Timothy B. Dickerson  
23 Judge of the Superior Court  
24 Division IV  
Bisbee, Arizona 85603  
Via Courthouse Distribution Box

Cochise County Attorney's Office  
Attn: Michael Powell, Esq.  
Deputy County Attorney  
Post Office Drawer CA  
Bisbee, Arizona 85603  
Attorney for the State  
Hand-Delivered

26 Defendant

11:55:48 11/15/15

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Email communications between the State  
and Defendant's Counsel regarding disclosure

THOMAS, Edward L.; CF2019000640-JP1

Roger H. Contreras

Thu 8/29/2019 11:20 AM

To: Powell, Michael <MPowell@cochise.az.gov>

Michael,

After reviewing the State's ERC disclosure, I am compelled to request the following items:

Re: 07-10958:

9326-A1 Job #6 (referenced on p62) digital audio of forensic interview Michelle Hunter/Amy Evans (from TV)

9326-DVD1 (referenced on p62) digital visual recording of same interview

9326-A2 Job #17 (referenced on p61) interview with Staphanie [sic] Hunter

9326-A3 Job #19 (referenced on p60) digital audio recording of interview with Ed Thomas

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0213-1 (referenced on p25) Panasonic Microcassett [sic] Red=Black-White in Color

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Remainder of report commencing p48

Remainder of report commencing p45

Remainder of report commencing p36

Please let me know when those items are available for retrieval.

Thank you,

***Roger H. Contreras, Esq.***

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Re: THOMAS, Edward L.; CF2019000640-JP1

Roger H. Contreras

Thu 10/10/2019 12:24 PM

To: Powell, Michael <MPowell@cochise.az.gov>

In response to my email below, I have only received State's Disclosure Item # 82 (a CD containing the bolded item below - 9326-A3 Job #19 (referenced on p60) digital audio recording of interview with Ed Thomas). All other items requested remain outstanding. Can I expect to receive those items anytime in the near future, or will I be required to file a Motion to Compel? Obviously, I'd rather the State voluntarily comply with the request. Please let me know if a little more patience will be worthwhile.

Best wishes,

***Roger H. Contreras, Esq.***

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**Sent:** Thursday, August 29, 2019 11:20 AM

**To:** Powell, Michael <MPowell@cochise.az.gov>

**Subject:** THOMAS, Edward L.; CF2019000640-JP1

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RE: THOMAS, Edward L.; CF2019000640-JP1

Powell, Michael <MPowell@cochise.az.gov>

Thu 10/10/2019 12:30 PM

To: Roger H. Contreras <rcontreras@attorneyrc.com>

You should have received everything so far that is in the State's possession. Due to the age of the original investigation, certain items are no longer available. Those items that remain in the State's possession have been disclosed.

From: Roger H. Contreras <rcontreras@attorneyrc.com>

Sent: Thursday, October 10, 2019 12:24 PM

To: Powell, Michael <MPowell@cochise.az.gov>

Subject: Re: THOMAS, Edward L.; CF2019000640-JP1

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RE: THOMAS, Edward L.; CF2019000640-JP1

Powell, Michael <MPowell@cochise.az.gov>

Thu 10/10/2019 12:36 PM

To: Roger H. Contreras <rcontreras@attorneyrc.com>

The audio recording of Thomas' confession is available. The CD is available and is referenced in the supplemental disclosure notice. As I understand one of your prior emails in this case, however, you are objecting to paying the cost of a copy being prepared for you. Is that correct? If so, then you'll need to come to the CAO with the necessary materials to burn a copy of the CD yourself.

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Re: THOMAS, Edward L.; CF2019000640-JP1

Roger H. Contreras

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***Roger H. Contreras, Esq.***

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**To:** Powell, Michael <MPowell@cochise.az.gov>

**Subject:** Re: THOMAS, Edward L.; CF2019000640-JP1

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Powell, Michael <MPowell@cochise.az.gov>

Fri 10/11/2019 9:52 AM

To: Roger H. Contreras <rcontreras@attorneyrc.com>

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Re: THOMAS, Edward L.; CF2019000640-JP1

Roger H. Contreras

Fri 10/11/2019 12:27 PM

To: Powell, Michael <MPowell@cochise.az.gov>

Alright, now I'm really confused. I thought you said that "[t]hose items that remain in the State's possession have been disclosed"; that everything else is no longer available due to the age of the case. Now, you're suggesting that "*some stuff* no longer exists", and you have promised to "look for the exact things" I'm requesting. My original request was delivered on August 29, 2019 - well over a month ago. Coincidentally, Mr. Thomas was indicted on the same date. His arraignment occurred on September 16, 2019. Rule 15 requires initial disclosure of everything in the charging attorney's possession by the Arraignment, and supplemental disclosure within 30 days of that date. Again, I don't know if any of the materials I requested still exist based on your previous statement that "[t]hose items that remain in the State's possession have been disclosed", even though you apparently haven't "look[ed] for the exact things" I seek. Do these materials exist? Do I need to file a Motion to Compel?

I'm not trying to be confrontational, Michael. I just need to know what direction to face.

Heads up, in any event: I will be filing a Motion to Dismiss based on substantive due process grounds (delayed prosecution).

Please let me know whether I can expect any additional disclosure.

Thanks, and have a good weekend.

***Roger H. Contreras, Esq.***

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**From:** Powell, Michael <MPowell@cochise.az.gov>

**Sent:** Friday, October 11, 2019 9:52 AM

**To:** Roger H. Contreras <rcontreras@attorneyrc.com>

**Subject:** RE: THOMAS, Edward L.; CF2019000640-JP1



**RE: THOMAS, Edward L.; CF2019000640-JP1**

Powell, Michael <MPowell@cochise.az.gov>

Tue 10/15/2019 4:55 PM

To: Roger H. Contreras <rcontreras@attorneyrc.com>

Job# 6 (Audio/video from forensic interview) – No longer available.

Job# 17 (Interview with Stephanie Hunter) – Still checking

Job #19 (Defendant interview) – You should have

Re: 2003 DR. I'm working on that one. I've had the old file pulled from archives to see what may still be around.

Hope that gives you a little clarity. Most of what you're looking for is in that 2003 report.

Thanks,  
Michael

**From:** Roger H. Contreras <rcontreras@attorneyrc.com>

**Sent:** Friday, October 11, 2019 12:28 PM

**To:** Powell, Michael <MPowell@cochise.az.gov>

**Subject:** Re: THOMAS, Edward L.; CF2019000640-JP1

**CAUTION: EXTERNAL EMAIL\***

Alright, now I'm really confused. I thought you said that "[t]hose items that remain in the State's possession have been disclosed"; that everything else is no longer available due to the age of the case. Now, you're suggesting that "*some stuff* no longer exists", and you have promised to "look for the exact things" I'm requesting. My original request was delivered on August 29, 2019 - well over a month ago. Coincidentally, Mr. Thomas was indicted on the same date. His arraignment occurred on September 16, 2019. Rule 15 requires initial disclosure of everything in the charging attorney's possession by the Arraignment, and supplemental disclosure within 30 days of that date. Again, I don't know if any of the materials I requested still exist based on your previous statement that "[t]hose items that remain in the State's possession have been disclosed", even though you apparently haven't "look[ed] for the exact things" I seek. Do these materials exist? Do I need to file a Motion to Compel?

I'm not trying to be confrontational, Michael. I just need to know what direction to face.

Heads up, in any event: I will be filing a Motion to Dismiss based on substantive due process grounds (delayed prosecution).

Please let me know whether I can expect any additional disclosure.

Thanks, and have a good weekend.

**Roger H. Contreras, Esq.**

**LAW OFFICE OF ROGER H. CONTRERAS**

**Re: THOMAS, Edward L.; CF2019000640-JP1**

Roger H. Contreras

Thu 11/7/2019 10:58 AM

To: Powell, Michael <MPowell@cochise.az.gov>

Any further progress on these discovery requests?

*Roger*

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**From:** Powell, Michael <MPowell@cochise.az.gov>

**Sent:** Tuesday, October 15, 2019 4:54 PM

**To:** Roger H. Contreras <rcontreras@attorneyrc.com>

**Subject:** RE: THOMAS, Edward L.; CF2019000640-JP1

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Automatic reply: THOMAS, Edward L.; CF2019000640-JP1

Powell, Michael <MPowell@cochise.az.gov>

Thu 11/7/2019 10:59 AM

To: Roger H. Contreras <rcontreras@attorneyrc.com>

I am out of the office until 11/12/19.

I will have limited access to email during this time. Please excuse my delayed response.

Please contact Lupita Mendoza at 520-432-8700 if you need immediate assistance.